PP

v.

LIN YU CHOY

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
HELILIAH MOHD YUSOF JCA
SULONG MATJERAIE JCA
[CRIMINAL APPEAL NO: J-05-77-2007]
10 SEPTEMBER 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 324.1 grams of monoacetylmorphines - Appeal against reduction of charge to one of possession - Whether trial judge correctly equated the drawing of an inference with the invoking of a statutory presumption - Presumptions of possession and trafficking - Dangerous Drugs Act 1952, s. 37(d), (da)*

EVIDENCE: *Presumption - Drug trafficking - Whether trial judge correctly equated the drawing of an inference with the invoking of a statutory presumption - Presumptions of possession and trafficking - Dangerous Drugs Act 1952, s. 37(d), (da)*

CRIMINAL PROCEDURE: *Trial - Presumptions against accused - Whether trial judge correctly equated the drawing of an inference with the invoking of a statutory presumption - Presumptions of possession and trafficking - Dangerous Drugs Act 1952, s. 37(d), (da)*

The respondent/accused was originally charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act') with the offence of trafficking in 324.1 grams of monoacetylmorphines. However, after the defence case, the trial judge found the accused guilty of the reduced charge of possession under s. 12(2) of the Act, punishable under s. 39A(2) of the Act, and sentenced him to 14 years' imprisonment and ten strokes of whipping. This was the prosecution's appeal against the entire decision of the High Court. The trial judge, at the close of the prosecution's case, had arrived at a specific finding of fact that the accused was in physical possession of the incriminating drug and by way of inference, had found that the accused was in *mens rea* possession of the drug. The trial judge equated the drawing of an inference with the invoking of the statutory presumption of possession under s. 37(d) of the Act and, that being the case, the proved possession as such did not permit the application of the presumption of

A trafficking under s. 37(da) of the Act. The issue requiring determination was whether the trial judge had correctly equated the drawing of an inference with the invoking of a statutory presumption.

B **Held (allowing the appeal)**
Per Low Hop Bing JCA delivering the judgment of the court:

(1) In trafficking cases, possession is an element which must be proved before one proves trafficking. The presumption in s. 37(d) of the Act merely requires proof of custody or control. With proof of custody or control, including any inference arising from the known fact to arrive at custody or control, the law allows the element of possession to be arrived at by way of a deeming provision. A presumption is provided by law, and it involves a situation where the law provides proof of a fact in issue when basic evidence is available. When a presumption is invoked, the burden on the accused is discharged by rebutting it on a balance of probabilities, whereas an inference of fact is rebutted by creating reasonable doubt. On the facts of the instant appeal, the inference related to the element of knowledge based on the accused's conduct of throwing the plastic bag and running away. The invoking of the statutory presumption of possession was derived from custody or control to enable the deemed possession to be triggered under s. 37(d) of the Act. Therefore, the trial judge had misdirected himself at the close of the defence case when he equated an inference with a statutory presumption. (paras 22, 23, 24, 25 & 26)

G *[Conviction and sentence imposed by High Court substituted with conviction under original charge of trafficking and mandatory death sentence.]*

Bahasa Malaysia *Translation Of Headnotes*

H Responden/tertuduh telah pada asalnya dituduh di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') dengan kesalahan mengedar 324.1 gram monoacetylmorphines. Walau bagaimanapun, selepas kes pembelaan, hakim perbicaraan mendapati tertuduh bersalah atas tuduhan yang dikurangkan di bawah s. 12(2) Akta, yang boleh dihukum di bawah s. 39A(2) Akta, dan menghukumnya kepada 14 tahun pemenjaraan dan sepuluh sebatan. Ini adalah rayuan pendakwaan terhadap keseluruhan keputusan Mahkamah Tinggi itu. Hakim perbicaraan,

pada penghujung kes pendakwaan, telah membuat suatu dapatan khusus bahawa tertuduh mempunyai milikan fizikal dadah yang membuktikan kesalahannya dan melalui inferens, telah memutuskan bahawa tertuduh mempunyai *mens rea* milikan dadah itu. Hakim perbicaraan menyamakan pembuatan inferens itu dengan penggunaan anggapan statutori milikan di bahawa s. 37(d) Akta dan, oleh itu, milikan yang dibuktikan itu tidak membenarkan pemakaian anggapan mengedar di bawah s. 37(da) Akta. Isu yang perlu ditentukan ialah sama ada hakim perbicaraan adalah betul apabila menyamakan pembuatan inferens itu dengan penggunaan sesuatu anggapan statutori.

Diputuskan (membenarkan rayuan)
Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah:

(1) Dalam kes-kes mengedar, milikan merupakan satu elemen yang mesti dibuktikan sebelum seseorang membuktikan pengedaran. Anggapan dalam s. 37(d) Akta hanya memerlukan bukti jagaan atau kawalan. Dengan bukti jagaan atau kawalan, termasuk apa-apa inferens yang berbangkit daripada fakta yang diketahui untuk mencapai jagaan atau kawalan, undang-undang menbenarkan elemen milikan dicapai melalui sesuatu peruntukan beranggapan. Sesuatu anggapan disediakan oleh undang-undang, dan ia melibatkan suatu situasi di mana undang-undang menyediakan bukti suatu fakta dalam isu apabila adanya keterangan asas. Apabila suatu anggapan digunakan, beban pada tertuduh dilepaskan dengan mematahkannya atas imbangan kebarangkalian, sementara suatu inferens fakta dipatahkan dengan mewujudkan keraguan munasabah. Atas fakta-fakta rayuan semasa, inferens berhubung dengan elemen pengetahuan berdasarkan kelakuan tertuduh membuang beg plastik dan melarikan diri. Penggunaan anggapan statutori milikan diperolehi daripada jagaan atau kawalan yang membolehkan anggapan milikan dicetuskan di bawah s. 37(d) Akta. Oleh yang demikian, hakim perbicaraan telah menyalaharahkan dirinya pada penghujung kes pembelaan apabila beliau menyamakan sesuatu inferens dengan sesuatu anggapan statutori.

[Sabitan dan hukuman yang dikenakan oleh Mahkamah Tinggi digantikan dengan sabitan di bawah tuduhan asal mengedar dan hukuman mati mandatori.]

A **Case(s) referred to:**
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC ***(refd)***

B **Legislation referred to:**
Dangerous Drugs Act 1952, ss. 2, 12(2), 37(d), (da)(iii), 39A(2), 39B(1)(a), (2)

Other source(s) referred to:
C *Phipson on Evidence*, 16th edn, at p 135 para 6-16

For the appellant - Nurul Huda Nurulain Mohd Nor DPP
For the respondent - Ahmad Nizam Mohamed; M/s Ahmad Nizam & Co

[Appeal from High Court, Johor Bahru; Criminal Trial No: 45-14-2001]

D *Reported by Suresh Nathan*

JUDGMENT

Low Hop Bing JCA:

E

Appeal

[1] The respondent ("the accused") was originally charged with the offence of trafficking in 324.1 gm of monoacetylmorphines, punishable under s. 39B(1)(a) of the Dangerous Drugs Act 1952. (A reference hereinafter to a section is a reference to that section in the Dangerous Drugs Act 1952, unless otherwise stated).

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[2] However, after the defence case, the learned trial judge found the accused guilty of the reduced charge of possession under s. 12(2), punishable under s. 39A(2). The accused was sentenced to 14 years imprisonment commencing from the date of arrest and ten strokes of whipping. Being dissatisfied with the reduction of the charge and the sentence, the prosecution preferred this appeal against the entire decision of the High Court.

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Case For Prosecution

[3] Acting on information, Chief Inspector Mazlan bin Murshidi (PW4) led a seven-member police party on 21 December 1999 to keep surveillance at Jalan Sutera 6, Taman Sentosa, Johor Bahru. They went there in two cars. At about 4pm, PW4 saw a Kawasaki motorcycle bearing registration No. JDP 9010 ridden by the accused who overtook PW4's car. The accused's motorcycle

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turned into a side lane. PW4 and his party proceeded to the lane. From the lane, the accused walked to Jalan Sutera 6 and stood at the junction there. The accused was holding a red plastic bag (exh. P7A) in his right hand. PW4 and his men alighted from their cars respectively and approached the accused. When PW4 identified himself by showing his authority card to the accused, the accused threw away the plastic bag and took to his heels.

[4] PW4 stood guard at the spot where the accused threw away the plastic bag, while his men chased the accused. Detective Lance Corporal Kamal apprehended the accused and brought him to the spot where the accused had thrown away the plastic bag earlier on. PW4 examined the red plastic bag in the presence of the accused; and found inside it another plastic bag (exh. P7B) which in turn contained ten packages wrapped in Chinese newspapers (exh. P8 to P17). In each of these ten packages, there was a plastic package containing yellowish granular substance suspected to be heroin. PW4 conducted a search on the accused and found a wallet containing an identity card in the accused's back pocket, while a motorcycle key was found in his front right pocket. PW4 then brought the accused to the place where the motorcycle was parked. PW4 used the key and ignited the motorcycle. The accused and the exhibits were brought to the Narcotics Division of the Johor Police Contingent Headquarters, where they were handed over to the investigating officer, C/Insp. Arsad bin Kamaruddin.

[5] Another member of the party, Sgt Ismail bin Harun (PW5), corroborated PW4's evidence.

[6] Under cross-examination, PW4 denied that:

(1) A black Honda Accord motorcar, parked at the entrance to the side lane, was the target;

(2) The accused was walking out of the lane and approaching the rear portion of the Honda Accord;

(3) The plastic bag (exh. P7A) was found in the basket at the rear of the motorcycle; and

(4) The key to the motorcycle was in the ignition hole.

[7] The chemist (PW3) confirmed that the exhibit contained 324.1 gm of monoacetylmorphines within the meaning of Dangerous Drug in s. 2.

A **Case For Prosecution**

[8] At the close of the prosecution's case, the learned trial judge correctly applied *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 CA; and *Balachandran v. PP* [2005]1 CLJ 85 and embarked on a
B maximum evaluation of the prosecution's evidence, and held that the prosecution has sufficiently presented credible evidence that the accused was carrying the incriminating drug in his right hand and it was in the accused's physical possession.

C **[9]** This in turn activates the presumption of trafficking under s. 37(da)(iii). Hence, a *prima facie* case was established for the accused to answer.

Defence Case

D **[10]** Besides the accused, two other witnesses namely, Lim Kian Aun (DW2), the driver of taxi No. HJ 1595, and Lee Ming (DW3), the accused's uncle, testified for the defence.

[11] The accused's evidence was that on the day in question, he
E had telephoned one Chew Keat Chee ("Chew") in the same housing estate to borrow a motorcycle (Kawasaki brand) from him in order to go to The Store Supermarket to purchase Christmas cards. Chew's house was about 10 to 15 minutes' walk from the accused's house. Lee Meng (DW3) who was then with the
F accused overheard the telephone conversation. DW3 requested the accused to buy some Christmas cards for him also. DW3 knew Chew was a friend of the accused. PW3 described Chew as a man in his 40's and of the same size as himself. The accused had taken the motorcycle home before he proceeded to the
G Supermarket. When the accused reached the Supermarket, he received a call from Chew who informed the accused that he (Chew) had left a package on the Kawasaki motorcycle. Chew asked the accused to meet him at a restaurant along Jalan Sutera 6. When the accused went to the restaurant, he did not see
H Chew there. The accused made a left turn, into the back lane of the restaurant. At the junction of the lane and Jalan Sutera 6, he saw Chew's car, a black Honda Accord. The accused then parked the Kawasaki motorcycle near Chew's car. The key was still at the motorcycle's ignition. When the accused approached Chew's car,
I another car suddenly arrived. Several people alighted therefrom and arrested him. The accused said he had no time to run and was not carrying anything in his hand. He was then taken to the

motorcycle where the police found the red plastic bag containing the drug in the basket at the back of the motorcycle. The accused denied any knowledge of this red plastic bag and its contents.

[12] At the close of the case for the defence, at p 73 of the appeal record, the learned trial judge held as follows:

> It is pertinent and relevant for me to state, at this point in time, that at the close of the prosecution's case, the Court had found possession proven by way of inferences made as opposed to an actual finding of *mens rea* possession. As I had stated earlier on, it was by way of inferences that I had found that the accused was in *mens rea* possession of the drugs.
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> Upon a maximum re-evaluation of the totality of the evidence adduced herein, I am of the considered view that the inferences arrived at by me to prove *mens rea* possession falls under another category called proved possession. In arriving at such proved possession through inferences is equivalent to applying the statutory presumption of possession contained in section 37(d) to found possession. In other words and in essence, inference so drawn are in fact similar to invoking a presumption to arrive at a conclusion. That being the case, the proved possession as such does not permit the application of the presumption of trafficking as contained in section 37(da) of the Act. To do so, would run afoul of the principle against double presumption as laid down by the Federal Court in *Muhammed bin Hassan v. PP* [1998] 2 CLJ 170.

Drawing Inference And Invoking Presumption

[13] Learned deputy public prosecutor Ms Nurul Huda Nurulain bt. Mohd Nor submitted that the learned trial judge had erred in equating the drawing of an inference with the invoking of a presumption.

[14] Mr Ahmad Nizam Mohamed, learned defence counsel, responded that the learned trial judge was correct in avoiding the application of double presumption under ss. 37(d) and 37(da), in line with *Muhammed bin Hassan, supra.*

[15] We must immediately emphasise that at the close of the prosecution's case, the learned trial judge had arrived at a specific finding of fact that the accused was carrying the incriminating drug in his right hand and hence in the accused's physical possession; and that by way of inferences, the learned trial judge had found

A that the accused was in *mens rea* possession of the drug. His Lordship has now equated the drawing of an inference with the invoking of a statutory presumption.

[16] The question that arises for determination now is whether
B the learned trial judge had correctly equated the drawing of an inference with the invoking of a statutory presumption.

[17] Inferences are quite distinct from statutory presumptions. This distinction is recognized in *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713, at p 748 where Steve Shim FCJ (later
C CJ (SS)) discussed the issue of double presumptions under s. 37(d) and s. 37(da) respectively.

[18] *The Shorter Oxford English Dictionary,* 5th edn, vol 1 defines the word 'inference' to mean:

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1. the action or process of inferring; the drawing of a conclusion from data or premises;

2. a conclusion drawn from data or premises; an implication, the conclusion that is intended to be drawn.

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[19] On the other hand, in the same dictionary, the word 'presume' is defined, *inter alia*, as:

> Assume to be true or proved in the absence of evidence to the contrary; presuppose; assume to be …

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[20] Presumptions in the form of deeming provisions are creations of statutes, such as s. 37(d) which creates the presumption of possession in the instant appeal in the following words:

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> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

H **[21]** Chong Siew Fai CJ (SS) (as he then was) in *Muhammed bin Hassan, supra*, at p 190 illustrated that:

> … the 'deemed' state of affairs in s. 37(d) (ie, deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived
I at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs, ie, the finding of custody or control. Such presumptions as under s. 37(d) (and, for that matter, the one under s. 37(da)) are sometimes described

> as 'compelling presumptions' in that upon proof of certain facts by a party (in our present case, proof of custody or control in s. 37(d) by the prosecution) the court must in law draw a presumption in its favour (ie, presumptions of possession and knowledge) unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires the trial court to make …

[22] In trafficking cases, possession is an element which must be proved before one proves trafficking. The presumption in 37(d) merely requires proof of custody or control. With proof of custody or control including any inference arising from the known fact to arrive at custody or control, the law allows the element of possession to be arrived at by way of a deeming provision.

[23] *Phipson on Evidence*, 16th edn, at p 135 para 6-16 explains that the effect of a presumption may be to require less evidence than would otherwise be necessary, or to make it unnecessary to call any evidence at all.

[24] In our view, a presumption is one provided by law. It involves a situation where the law provides proof of a fact in issue when basic evidence is available. When a presumption is invoked, the burden on the accused is discharged by rebutting it on a balance of probabilities, whereas an inference of fact is rebutted by creating a reasonable doubt.

[25] The inference relates to the element of knowledge based on the conduct of the accused in running away and throwing the plastic bag. The invoking of the statutory presumption of possession was derived from custody or control to enable the deemed possession to be triggered under s. 37(d).

[26] We hold that the learned trial judge had misdirected himself at the close of defence case when he equated an inference with a statutory presumption.

Conclusion

[27] On the foregoing grounds, we allowed this appeal, set aside the conviction and sentence imposed by the High Court and substituted it with a conviction under the original charge of s. 39(B)(1)(a) and imposed the mandatory death sentence under s. 39B(2).